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No. _____

IN THE
Supreme Court of the United States

DAVID L. SMITH,
PETITIONER,
V.
UNITED STATES OF AMERICA, COMMISSIONER OF INTERNAL REVENUE, HARRY T. MANAKA, DIANE M. PHILLIPS, AND GARY T. EASLEY,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH
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PRO SE ATTORNEY PETITIONER

November 4, 2009

QUESTIONS PRESENTED

Whether in dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005), the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; whether the Tenth Circuit has also arbitrarily deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review.

Whether the Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b); whether their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

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A. REVIEW IS WARRANTED BECAUSE IN DISMISSING SMITH'S APPEAL AS A SANCTION FOR HIS ALLEGED FAILURE TO PAY A MONETARY SANCTION OF $6,000 IMPOSED AGAINST HIM BY THE TENTH CIRCUIT IN A PRIOR APPEAL, *SMITH V. COMMISSIONER OF INTERNAL REVENUE*, 10 F. APP'X 666 (10TH CIR. 2005), THE TENTH CIRCUIT HAS AGAIN GROSSLY ABUSED ITS INHERENT POWER TO IMPOSE ATTORNEY DISCIPLINE AND OTHER SANCTIONS AGAINST SMITH, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; THE TENTH CIRCUIT HAS ALSO ARBITRARILY DEPRIVED SMITH OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO APPEAL AND RECEIVE MEANINGFUL APPELLATE REVIEW. 10

B. REVIEW IS WARRANTED BECAUSE THE JUDGES OF THE TENTH CIRCUIT WERE REQUIRED TO DISQUALIFY THEMSELVES FROM SMITH'S APPEALS IN ACCORDANCE WITH 28 U.S.C. § 455(A) AND (B); THEIR CONDUCT CONSTITUTED A DENIAL OF FIFTH AMENDMENT DUE PROCESS OF LAW UNDER

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OPINIONS BELOW

On July 6, 2009, a three-judge Panel of the United States Court of Appeals for the Tenth Circuit entered its Order and Judgment dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). The Tenth Circuit Panel's Order denying Smith's Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc* was entered on August 6, 2009. These orders or opinions are included in the Appendix attached to this Petition, at 1a-14a.

JURISDICTION

Jurisdiction in the Tenth Circuit was based on 28 U.S.C. § 1291. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the Tenth Circuit's decision is 28 U.S.C. § 1254(1), providing that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

Jurisdiction in this Court is also based on 28 U.S.C. § 2072, providing that "[t}he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts

and courts of appeals of the United States in civil actions . . . . " In dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005), the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); 28 U.S.C. § 2072; *Frazier v. Heebe,* 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). The Tenth Circuit has also deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review. U.S. CONST. amend. I; U.S. CONST. amend. V; 28 U.S.C. §§ 1291, 1654 and 2072. The Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b). Their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the . . .

right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend V.

28 U.S.C. § 455 provides, in pertinent part, that "(a) [a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and "(b) [h]e shall also disqualify himself in the following circumstances: (1) [w]here he has a personal bias or prejudice concerning a party . . . ."

28 U.S.C. § 1291 provides, in pertinent part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

28 U.S.C. § 2072 provides, in pertinent part, that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . . "

Pursuant to this Court's Rule 10, 12, 13 and 14, Pro Se Attorney Petitioner David L. Smith ("Smith") respectfully submits his Petition for a Writ of Certiorari. In support thereof, Smith alleges as follows:

STATEMENT OF THE CASE

This case was originally filed (on August 31, 2006) as an Adversary Proceeding in the United States Bankruptcy Court for the District of Colorado. In his Complaint and Jury Demand, Smith alleged claims for relief under 26 U.S.C. § 7433 and the Fifth Amendment to the Constitution of the United States:

> COME NOW the plaintiffs, M. Julia Hook and David L. Smith, and file their Complaint and Jury Demand against the above-named defendants, and allege as follows:
>
> 1. This is a suit for damages and other legal and equitable relief under 26 U.S.C. § 7433 and the Fifth Amendment to the Constitution of the United States. Jurisdiction is based on 26 U.S.C. § 7433 and 28 U.S.C. §§ 1331, 1340, and 1346(a). Venue is proper under 28 U.S.C. § 1391(e). Reference is made to the above case caption for the name, number and chapter of the case under the Bankruptcy Code to which the adversary proceeding relates and to the district where the case is pending. This is a non-core proceeding under the Bankruptcy Code and 28 U.S.C. § 157. Plaintiffs do not

consent to the entry of a final order or judgment by the Bankruptcy Judge.

2. On March 10, 2006, plaintiffs served a Request for a Collection Due Process Hearing on the Commissioner of Internal Revenue alleging as follows:

> This is the third time the taxpayers have requested a Collection Due Process Hearing to protest the filing of liens and/or levies on their property. (Copies of the previous requests are attached to this attachment.) While no Collection Due Process Hearing has been held by the Internal Revenue Service Office of Appeals, Internal Revenue Service Officer Diane M. Phillips and Western Area Director Harry T. Manaka have caused numerous liens and levies to be placed on the property or the right to property of the taxpayers, in violation of 26 U.S.C. §§ 6320(b) and 6330(b), and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. These lien and levy actions were effected during the period of suspension of lien and levy actions under 26 U.S.C. § 6330(e). As the proximate result of these reckless, intentional, and/or negligent statutory and/or constitutional violations by the Internal Revenue Officer and the

> Western Area Director, the taxpayers have sustained continuing actual, direct economic damages, for which they seek full compensation from the United States. *See* 26 U.S.C. § 7433. The taxpayers request a Collection Due Process Hearing with the Internal Revenue Service Office of Appeals on the foregoing issues, as well as those enumerated in 26 U.S.C. § 6330(c)(2), including challenges to the appropriateness of collection actions; offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise; and/or challenges to the existence or amount of the underlying tax liability for any tax year period if the taxpayers did not have an opportunity to dispute such tax liability.

In a cover letter, plaintiff Smith alleged that the Internal Revenue Officer is still refusing to comply with the February 6, 2006 collection decision by the Team Manager of the Internal Revenue Service Office of Appeals, Gary T. Easley, requiring release of the levy which attaches to approximately $16,964.00 in a Merrill Lynch Account, and requesting a release of this levy without further delay.

3. On March 28, 2006, no response having been made to plaintiffs' requests, plaintiff Smith wrote the following letter to the Internal Revenue Officer and the Team Manager Appeals:

> On March 10, 2006, I served (via hand delivery and certified mail) on each of you a Request for a Collection Due Process Hearing, as well as a letter requesting that all lien and levy actions which are the subject of the requested hearing be suspended for the period during which such hearing, and appeals therein, are pending, as required by 26 U.S.C. § 6330(e). You have not yet notified me whether you intend to comply with my requests.
>
> Unless I hear from you on these requests by Friday, March 31, 2006, at 5:00 p.m., I will have no choice but to pursue my remedies in the United States Tax Court and/or the United States District Court. Please respond, in writing, at the letterhead address or fax number ASAP.
>
> I am attaching a copy of an appeal recently filed in the Office of Collections, Internal Revenue Service in connection with IRS Agent Diane Phillip's role in the payment to the IRS by a law firm with which

Taxpayer Mary Julia Hook has a relationship (Fognani & Faught, PLLC) of an amount in excess of $36,500.00 that was Ms. Hook's share of her own client's payment for her legal work done over a ten-month period as an independent contractor (not an employee) of the law firm. The payment to the IRS was made by the law firm pursuant to a continuing levy that was served on the firm on or about August 16, 2005, and the payment was made only after the office manager was told by IRS Agent Phillips that the firm was required to make the payment despite Ms. Hook's independent contractor status.

4. In addition to the amounts mentioned in paragraphs 2 and 3 above, approximately $39,000 was wrongfully turned over to the IRS by Interactive Brokers LLC under Notice of Levy dated 08/12/2005; approximately $200 was wrongfully turned over to the IRS by Fognani & Faught, PLLC under Notice of Levy on Wages, Salary, and Other Income dated 08/12/2005 and 08/16/2005; and approximately $65,000 was wrongfully turned over to the IRS under letter dated 09/2005. No notice was given before levy, as required by 26 U.S.C. § 6331(d). Levy was made during the period of suspension of levy actions under 26 U.S.C. § 6330(e).

5. Plaintiffs have not had a full and fair opportunity, or any opportunity, to challenge or litigate the existence or amount (in excess of $500,000) of the underlying tax liability upon which defendants' unlawful liens and levies were based. The United States Tax Court entered a default judgment against plaintiffs as a sanction for their alleged failure to properly prosecute their tax cases without holding a due process hearing. This default judgment was based on false and defamatory charges made by the Commissioner of Internal Revenue and its attorneys, who thus committed a fraud on the Tax Court and the plaintiffs.

6. On March 29, 2006, plaintiff Hook filed her offer-in-compromise with the Commissioner of Internal Revenue under 26 U.S.C. § 7122. Therefore, under 26 U.S.C. § 6331(h), no levy may be made on the property or rights to property of plaintiff Hook during the period that her offer-in-compromise is pending, including her currently pending appeal of the determination by the IRS that she had filed her offer-in-compromise solely for the purpose of delay. Despite this stay, the IRS has made numerous threats to seize or sell Hook's property in violation of the stay.

7. As the result of defendants' unlawful actions, plaintiffs have been deprived of the cash and capital from which to fund their

law practices, plaintiff Hook's rental properties, and plaintiff Smith's securities trading activities, and from which to pay bills and expenses, including significant monthly mortgage amounts. Because of the cash flow problem, the bank has instituted foreclosure proceedings on plaintiff Hook's home and rental properties. Plaintiff Hook has been unable to secure re-financing of her mortgages because of defendants' unlawful liens and levies and the resulting damage to her credit. Plaintiffs have been forced to file for Chapter 11 bankruptcy.

WHEREFORE, plaintiffs request all actual, direct economic damages sustained as the proximate result of defendants' violation of plaintiffs' statutory and constitutional rights, in an amount to be proved to the jury at trial; mental or emotional distress damages; exemplary or punitive damages against defendants Harry T. Manaka, Diane M. Phillips, and Gary T. Easley in their individual capacities; an order declaring null and void *ab initio* the default judgment entered by the United States Tax Court against the plaintiffs; an order requiring the Commissioner of Internal Revenue to return to plaintiffs all money and other property (or right to property) subjected to levy or lien actions during the time the suspension under 26 U.S.C. § 6330(e)(1) was in force; pre- and post-judgment interest, costs and attorney fees (including expert witness fees); and such

other and further legal and equitable relief as may be just under the circumstances, including preliminary and permanent injunctive relief.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

On April 19, 2007, the Bankruptcy Judge dismissed Smith's Complaint for "lack of subject matter jurisdiction," and appeal was taken to the United States District Court for the District of Colorado, which affirmed the Bankruptcy Judge's dismissal of Smith's Complaint "in all respects." Appeal was then taken to the United States Court of Appeals for the Tenth Circuit, which dismissed (on July 6, 2009) the appeal as a sanction for Smith's alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). The Tenth Circuit Panel's Order denying Smith's Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc* was entered on August 6, 2009.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has a long history of imposing harsh and unjustified attorney discipline and other sanctions against Smith without due process of law. *See, e.g., Casillan v. Regional Transportation*

District, 986 F.2d 1426 (10th Cir. 1993) (monetary sanctions after case dismissal), *cert. denied*, 114 S.Ct. 2710 (1994); *DeHerrera v. City and County of Denver*, Nos. 93-1070, 93-1139 (10th Cir. September 3, 1993) (monetary sanctions and referral to the Tenth Circuit's attorney disciplinary panel for further proceedings); *In re Smith*, 10 F.3d 723 (10th Cir. 1993) (indefinite suspension from practice), *cert. denied*, 513 U.S. 807 (1994); *In re Smith*, 76 F.3d 335 (10th Cir. 1996) (*per curiam*) (disbarment), *cert. denied*, 519 U.S. 871 (1996); *DeHerrera v. City and County of Denver*, 89 F.3d 849 (10th Cir. 1996) (monetary sanctions and refusal to vacate same after case settlement); *Dunkin v. Louisiana-Pacific Corp.*, 89 F.3d 849 (10th Cir. 1996) (monetary sanctions), *cert. denied*, 117 S.Ct. 435 (1996); *Qualls v. Regional Transportation District*, No. 05-1385 (10th Cir. July 23, 1996) (monetary sanctions); *Dunkin v. Louisiana-Pacific Corp.*, 120 F.3d 270 (10th Cir. 1997) (refusal to vacate monetary sanctions after case settlement), *cert. denied*, 118 S.Ct. 884 (1998); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998) (*en banc*) (*per curiam*) (prospective filing restrictions after case dismissal). More recently, *see Smith v. Commissioner of Internal Revenue*, 10 F.App'x 666 (10th Cir. 2005) (monetary sanctions after case dismissal); *Smith v. Seymour*, 229 F.App'x 811 (10th Cir. 2007) (case dismissal); *Smith v. Colorado Supreme Court*, No. 08-1030 (10th Cir. July 24, 2008) (case dismissal); *In re Smith*, No. 08-822 (10th Cir. September 16, 2008) (admonition); *In re Smith*, No. 08-1323 (10th Cir. May 12, 2009) (refusal to readmit or reinstate Smith to the Bar of the United States District Court for the District of Colorado), *cert.*

pending, sub nom Smith v. United States Court of Appeals for the Tenth Circuit, No. 09-303 (filed August 26, 2009). In these cases, the Tenth Circuit grossly abused its inherent power to impose attorney discipline and other sanctions against Smith. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

A. REVIEW IS WARRANTED BECAUSE IN DISMISSING SMITH'S APPEAL AS A SANCTION FOR HIS ALLEGED FAILURE TO PAY A MONETARY SANCTION OF $6,000 IMPOSED AGAINST HIM BY THE TENTH CIRCUIT IN A PRIOR APPEAL, *SMITH V. COMMISSIONER OF INTERNAL REVENUE,* 10 F. APP'X 666 (10TH CIR. 2005), THE TENTH CIRCUIT HAS AGAIN GROSSLY ABUSED ITS INHERENT POWER TO IMPOSE ATTORNEY DISCIPLINE AND OTHER SANCTIONS AGAINST SMITH, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; THE TENTH CIRCUIT HAS ALSO ARBITRARILY DEPRIVED SMITH OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO APPEAL AND RECEIVE MEANINGFUL APPELLATE REVIEW.

In the absence of a finding that Smith acted in bad faith, the Tenth Circuit has again grossly abused its inherent power to impose the sanction of case dismissal against Smith for his alleged failure

to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

On March 9, 2009, Smith filed his Response in Opposition to Motion to Dismiss This Appeal and Request for Oral Argument. Smith stated that in addition to their failure to comply with 10th Cir. R. 27.2(A)(3)(a), providing that "[a] motion [to dismiss] under (A)(1)(a) . . . should be filed within 15 days after the notice of appeal is filed, unless good cause is shown," the Commissioner of Internal Revenue and other Defendants-Appellees failed to demonstrate that Smith failed to pay or otherwise satisfy the referenced monetary sanction. In their Motion to Dismiss, Defendants-Appellees' attorneys asserted that "[t]his office [Tax Division, Department of Justice] has no record that any portion of this previously-imposed sanction has been paid." However, this previously-imposed sanction was listed on the schedules filed in Smith's and his wife's Chapter 11 bankruptcy cases (Nos. 06-15511 and 08-11271) as disputed claims against the estates. Defendants-Appellees failed to file proofs of claim or otherwise pursue their claims against Smith and/or his wife in the Bankruptcy Court. Furthermore, Defendants-Appellees' unlawful liens and levies on Smith's property have prevented Smith from being able to pay this previously-imposed sanction. These

unlawful liens and levies are described in Smith's Complaint and Jury Demand filed in the Bankruptcy Court in Adversary Proceeding No. 06-01762. Finally, Defendants-Appellees continue to levy on 100% of Smith's only income of $500+ per month in Social Security benefits, despite repeated promises by Internal Revenue Service Attorney Joan E. Steele that Defendants-Appellees' unlawful levy on amounts beyond the statutory limit would be lifted. These promises were made by IRS Attorney Steele during hearings in Smith's wife's Chapter 11 bankruptcy case (No. 08-11271).

In its July 6, 2009 Order and Judgment, the Tenth Circuit Panel found and concluded that based on the assertion made by Defendants-Appellees' attorneys, Smith failed to pay the previously imposed sanction, and dismissed his appeal as a sanction for his failure to pay. No finding was made as to whether Smith acted in bad faith.

On July 17, 2009, Smith filed his Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc*. In support thereof, Smith submitted M. Julia Hook's Declaration Under Penalty of Perjury:

> 1. My name is M. Julia Hook, also known as Julia Hook and Mary Julia Hook. I am over the age of eighteen years, and am otherwise competent to make this Declaration.
>
> 2. I have been an attorney for nearly 37 years, and am licensed to practice law in the

States of Colorado and Texas as well as in a number of federal courts, including the United States Court of Appeals for the Tenth Circuit.

3. I have been married to David L. Smith, also know as David Lee Smith, since December of 1972; and although we have been separated and living apart for approximately 10 years, I am generally familiar with his financial situation and I have personal knowledge of all of the facts contained within this Declaration.

4. David L. Smith's sole independent source of income is his monthly social security check in the amount of approximately $500. The Commissioner of Internal Revenue/Internal Revenue Service has levied on Mr. Smith's social security and has been taking 100% of this amount since at least December of 2007. Mr. Smith owns no assets other than his clothes, books, a 40-year old car and similar personal effects of limited economic value. Mr. Smith and I have never divorced; and I am aware that if we were to do so, under Colorado law he would more likely than not be entitled to a significant portion of my assets and income in the form of spousal support. In addition, although we are separated, I am aware that under Colorado law I have obligations for his financial support. In fulfillment of that obligation, I currently provide him a place to

live in a condominium unit that I own, and cover the expense of his other basic necessities of life.

5. In 2005, this Court imposed a monetary sanction of $6,000 against Mr. Smith and me in *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). This case was an appeal from default judgments entered by the Tax Court against Mr. Smith and me for taxes, penalties and interest relating to five tax years in the 1990s. I represented Mr. Smith in his appeal. The sanction was payable to the United States Department of Justice and/or the Commissioner of Internal Revenue/Internal Revenue Service.

6. When the $6000 sanction against Mr. Smith and me was imposed by this Court in 2005, Mr. Smith was without assets or funds of any sort to pay it. Before I was able to pay the sanction out of my assets and income, the Commissioner of Internal Revenue/Internal Revenue Service levied on my bank and brokerage accounts and garnished the funds I had earned in the hands of the law firm with which I am affiliated (as well as all funds I would earn by virtue of the affiliation in the future), leaving me without funds with which to pay the sanction. The levies and garnishments, which were filed for the five tax years in the 1990s that were the subject of Mr. Smith's appeal, also meant I could not

make mortgage payments on three real properties that I own; and as a result, foreclosure proceedings were started with respect to those properties.

7. As a result of the levies and garnishments filed by the Commissioner of Internal Revenue/Internal Revenue Service against me and their impact on my assets (including real properties) and income, Mr. Smith and I were forced to file for Chapter 11 bankruptcy in August of 2006 (Case No. 06-15511).

8. The $6000 sanction imposed by this Court in *Smith v. Commissioner of Internal Revenue, supra* was listed as a disputed claim in Case No. 06-15511. Neither the Commissioner of Internal Revenue/Internal Revenue Service nor the United States Department of Justice filed a proof of claim or otherwise pursued their claim for the $6000 sanction against Mr. Smith and/or me in Case No 06-15511, although they were given appropriate notice of the bankruptcy filing.

9. Bankruptcy Case No. 06-15511 was dismissed in September of 2007 on the motion of the Commissioner of Internal Revenue/Internal Revenue Service.

10. In February of 2008, I filed a Chapter 11 bankruptcy case on my own behalf (Case

No. 08-11271), listing the entire $6000 sanction imposed in *Smith v. Commissioner of Internal Revenue, supra* as a disputed claim against me in my sole and separate capacity. Once again the Commissioner of Internal Revenue/Internal Revenue Service and the United States Department of Justice failed to file a proof of claim or otherwise pursue their claim for the $6000 sanction against me, although they were given appropriate notice of the bankruptcy filing.

11. The Commissioner of Internal Revenue/Internal Revenue Service, represented by Internal Revenue Service Attorney Joan E. Steele (who also identified herself in pleadings as a special attorney in the United States Department of Justice/United States Attorney's Office) did file a proof of claim in Case No. 08-11271 for amounts resulting from the default judgments imposed against Mr. Smith and me by the Tax Court for taxes, penalties and interest relating to the five years in the 1990s that were the subject of Mr. Smith's appeal in *Smith v. Commissioner of Internal Revenue, supra.*

12. Although a separate proof of claim was not filed in my bankruptcy case for the $6000 sanction imposed by this Court against Mr. Smith and me in *Smith v. Commissioner of Internal Revenue, supra,* I believe it is likely that the amount claimed

by Attorney Steele on her clients' behalf includes that sanction. Despite Attorney Steele's repeated representations to my bankruptcy attorney and me that she would go over the total amount in her clients' proof of claim with us and articulate the basis for each amount listed, to date she has failed to do so.

13. A plan of reorganization and disclosure statement in my bankruptcy case was approved by Judge Sidney B. Brooks in December of 2008, with the consent of Attorney Steele on behalf of her clients. Under my plan of reorganization, I have assumed responsibility for paying 100% of the amount relating to the five years in the 1990s claimed by Attorney Steele on her clients' behalf -- an amount that I believe may well include the $6000 sanction imposed by this Court in *Smith v. Commissioner of Internal Revenue, supra* (Mr. Smith's appeal of the default judgments entered by the Tax Court against us for those years).

14. Despite the fact that the Commissioner of Internal Revenue/Internal Revenue Service has levied on Mr. Smith's sole independent source of income and has been taking 100% of his monthly social security in the amount of approximately $500 since at least December of 2007, I do not believe any of that money has been applied to reduce the debt relating to the five

tax years in the 1990s that I am paying to the Commissioner of Internal Revenue/Internal Revenue Service under my approved plan of reorganization. I can only assume that the $10,000 taken from Mr. Smith has been applied to the $6000 sanction imposed in *Smith v. Commissioner of Internal Revenue, supra*; although it is also likely that I am paying the same $6000 sanction under my plan of reorganization.

15. In approximately March of 2008, during a hearing in my bankruptcy case, Attorney Steele -- on her clients' behalf -- acknowledged that it would be improper for her clients to levy on and take 100% of Mr. Smith's social security payments; and she represented to the bankruptcy court that she would ensure that the situation was promptly rectified. To date, however, she has failed to do so despite repeated inquiries by my bankruptcy attorney; and the Commissioner of Internal Revenue/Internal Revenue Service continues to take 100% of Mr. Smith's only independent source of income.

16. If the approximately $10,000 taken from Mr. Smith by the Commissioner of Internal Revenue/Internal Revenue Service since December of 2007 has not been applied to the $6000 sanction and it remains unpaid by Mr. Smith, I know that he cannot pay the sanction as he is without any resources with

which to pay it. My income is committed to being expended (and is being expended) in accordance with the approved plan of reorganization in my Chapter 11 bankruptcy case – a plan that includes monthly and quarterly payments that may also cover the $6000 sanction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of July, 2009.

Ms. Hook's Declaration Under Penalty of Perjury further demonstrated that Smith did not fail to pay or otherwise satisfy the monetary sanction of $6,000 imposed against him by the Tenth Circuit in the prior appeal, and that he did not act in bad faith.

In its August 6, 2009 Order, the Tenth Circuit Panel said:

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

By completely ignoring Ms. Hook's Declaration Under Penalty of Perjury, and failing or refusing to

make a finding as to whether Smith acted in bad faith, the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); 28 U.S.C. § 2072; *Frazier v. Heebe,* 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). The Tenth Circuit has also deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review. U.S. CONST. amend. I; U.S. CONST. amend. V; 28 U.S.C. §§ 1291, 1654 and 2072.

B. REVIEW IS WARRANTED BECAUSE THE JUDGES OF THE TENTH CIRCUIT WERE REQUIRED TO DISQUALIFY THEMSELVES FROM SMITH'S APPEALS IN ACCORDANCE WITH 28 U.S.C. § 455(A) AND (B); THEIR CONDUCT CONSTITUTED A DENIAL OF FIFTH AMENDMENT DUE PROCESS OF LAW UNDER THIS COURT'S DECISION IN *CAPERTON V. A.T. MASSEY COAL CO.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and, under § 455(b), "[h]e shall also disqualify himself . . .

(1) [w]here he has a personal bias or prejudice concerning a party . . . ." The impartiality of the Judges of the Tenth Circuit might reasonably be questioned based on their long history of imposing harsh and unjustified attorney discipline and other sanctions against Smith without due process of law. Obviously, the Judges of the Tenth Circuit have a personal bias or prejudice against Smith. For these reasons, the Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b). Their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the petitioner).

Respectfully submitted,

/s/David L. Smith

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